IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-128

KRANCO, INC.,
Petitioner

against

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

LIST OF AUTHORITIES

CASES

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OPINIONS BELOW

1. The official report (decision and order) of the NLRB administrative law judge in this matter is reported at 228 NLRB No. 45 and is annexed hereto as Appendix 1.

2. The official report (decision and order) of the NLRB affirming the decision of the administrative law judge and adopting his recommended order in all material respects is officially reported at 228 NLRB No. 45 and is annexed hereto as Appendix 2.

3. The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit enforcing the order of the NLRB is unpublished and is annexed hereto as Appendix 3.

JURISDICTION

1. The decision and opinion of the United States Court of Appeals for the Fifth Circuit enforcing the order of the NLRB was dated and entered in the office of the clerk of the court of appeals on April 11, 1978. (Appendix 3)

2. Petitioner's Petition for Rehearing was denied by order of the United States Court of Appeals for the Fifth Circuit dated May 10, 1978, a copy of which is annexed hereto as Appendix 4.

3. The judgment of the United States Court of Appeals for the Fifth Circuit was entered in this cause on May 18, 1978, a copy of which is annexed hereto as Appendix 5.

4. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari pursuant to Title 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. General Question: Where an employer has been charged with a violation of §8(a)(1) and (3) of the Labor Management Relations Act in effecting employee terminations but has offered evidence of economic justification for same, under what circumstances may the employer be found in violation of such sections of the Act?

2. Specific Question: Where the NLRB has through circumstantial evidence presented a *prima facie* case of discriminatory employee terminations, what burden of proof must an employer meet to establish an issue of economic justification for such terminations?

3. Specific Question: Where the NLRB has through circumstantial evidence presented a *prima facie* case of discriminatory terminations, and the employer has offered evidence of economic justification for same, what burden of proof must the NLRB satisfy to establish a violation of § 8(a) (1) and (3) of the Act?

STATUTORY PROVISIONS

1. The issues presented in this petition involve the Labor Management Relations Act, Title 29 U.S.C. § 141, et seq. The relevant sections of the Act are § 158(a)(1) and (3) which read in pertinent part as follows:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition or employment to encourage or discourage membership in any labor organization. . . ."

STATEMENT OF THE FACTS: FACTS

Kranco is a Texas corporation engaged in the fabrication of special order industrial cranes ranging in size from comparatively small single girder cranes to enormous polor

cranes, weighing as much as 500,000 pounds and with lifting capacity of 500 tons. (Tr. 78, 453, 455)* The company's production operations consist of the fabrication, mechanical, machine shop, and coating departments. Prior to the period in question, Kranco employed at its Houston facilities approximately 130 production employees (Tr. 644, 649) about 100 of whom were assigned to the day and 30 to the night shift. (Tr. 61) Both shifts worked 10 hours a day, 5 days a week and also performed some Saturday work. (Tr. 121).

The year 1975 was favorable to Kranco, and in October of 1975 management submitted its 1976 budget which forecast an even better year (Tr. 456). Thereafter, a continuing series of events combined steadily to darken Kranco's commercial picture for 1976. Despite numerous interim measures, Kranco was unable to reverse the deteriorating trend in its business and during February the company began to consider a reduction in its work force (Tr. 471, 473-474). Finally, about the last week in February (Tr. 40, 474, 620) because of workload dissipation and no foreseeable improvement (Tr. 444), company management determined to effect same.

At about this same time the Carpenters District Counsel of Houston and vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America (Union) commenced a campaign to organize Kranco's production employees. Union handbilling in the company's parking lot on February 19, 1976 alerted management to the Union's efforts.

On March 4, the company terminated a number of its

* All citations herein are to the original transcript of these proceedings.

employees in its night shift fabrication department.[1] The Union then filed a charge with the NLRB alleging that such discharges were in violation of § 8(a)(3) of the Labor Management Relations Act and in due course the NLRB issued a complaint alleging same.

At trial, the NLRB presented a largely circumstantial evidence case including the facts that company management had announced both orally and in writing that it was adverse to the Union organizing effort, that the company committed contemporaneous unfair labor practices, that all terminated employees had signed Union authorization cards, that supervisor Michulka had conversed with employees and in so doing had learned that some of the employees who were eventually terminated supported the Union, that the employees were terminated on a Thursday rather than at the end of the workweek, that the employees were terminated rather than laid-off, that in December of 1975, Kranco had sent a Christmas card to its employees announcing that back-logs were the highest in the company's history and predicting a great year in 1976, and that at the time of the lay-off the company was advertising for new employees in the newspaper, was maintaining a "job openings" sign in the vicinity of the plant and was constructing additional facilities to expand its capacity. The Board further presented evidence that Kranco had never had a reduction in force before and that at various times in the past management had reassured employees in this regard. Finally, the evidence showed that when most em-

1. Following the initial reduction in force, the company continued to trim its work force during the next month. All told, during March and April there were approximately forty terminations, twenty of which were involuntary and about the same number voluntary, many of the latter having been caused by Kranco's elimination of overtime (Tr. 135, 136, 138, 472).

ployees were informed of their lay-off they simply shook hands with their supervisors and responded that they understood the situation (Tr. 276, 400); but allegedly one employee angrily charged that the employees were being terminated because of their support for the Union to which supervisor Michulka responded, as he often did in conversations with the employees, by nodding his head (Tr. 422, 436). However, the administrative law judge in reaching his decision expressly declined to give the supervisor's response any "great weight" (ALJD p. 12).

In response to this evidence, Kranco sought generally to explain the NLRB's circumstantial case.[2] More significantly, however, the company presented an exhaustively documented recitation of its economic justification for the terminations. Specifically, the company presented evidence that prior to the terminations it experienced a serious reversal in its business fortunes when it received notice of the cancellation of one large box girder crane and the postponement of 2 other box girder cranes for 1976 shipment to 1977, (Tr. 445). The cranes had a combined billing price in excess of $1,000,000.00 and

2. Notwithstanding the NLRB's exaggerated characterization of various aspects of its circumstantial evidence, the Board in this case was unable to present any "smoking gun" piece of evidence in support of its complaint. For example, the company's employment advertisements at the times of the terminations were for office and service rather than for production employees and all hiring of production employees had stopped prior to the terminations and had not recommenced at the time of trial. The administrative law judge in his decision also stated that when one of the terminated employees sought to reapply at Kranco for a crane service position, he was abruptly told that the minimum qualification "had just been increased" (ALJD at p. 12). In fact the minimum qualifications had not just been increased, and the employee was invited to return when the personnel manager was present to discuss the opening with him, but the employee never bothered to (Tr. 168, 608). In view of this obvious mischaracterization, Petitioner respectfully asks this Court to consider the NLRB's recount of the facts with a "grain of salt".

represented 25,000 to 30,000 man-hours of work (Tr. 446). Moreover in the latter part of December the number and amount of purchase orders began to decline (Tr. 444).

Despite interim measures, the company's oral and documentary evidence demonstrated that in January and February of 1976, inbound business virtually collapsed (Tr. 444, 555 et seq., R. Ex. 11, 12). The company's total January sales of $215,146, far from compensating for lost and postponed orders were approximately $700,-00 short of replacing the amount of business that was going out (Tr. 578). Although total sales rose to $452,106 in February, only $140,000 involved cranes deliverable in 1976. (R. Ex. 11) The purchase orders which the company received in January and February constituted only a small fraction of the total which it had previously predicted in its 1976 budget. In short, during this period, its bookings were lower than they had ever been before (Tr. 496).

Kranco further documented and illlustrated its adverse business circumstances through numerous other business records and summaries of business records. Thus its Summary of Billing and Shop Hours dated February 7, 1976, (R. Ex. 1) showed that the company was critically short of work which could be scheduled for all the remainder of 1976. Similar summaries further showed that just prior to the terminations the current backlog of orders for delivery in each remaining month for 1976 was but a fraction, in some cases a small fraction, of the purchase orders which had been budgeted and anticipated for each remaining month. Comparison of such summaries for 1975 and 1976 emphasized how far behind the company had fallen in booking purchase orders

for the remainder of 1976. Finally, the company's Summary of Billing and Shop Hours dated February 28, 1976, illustrated the key fact that as of that date, the hours remaining to complete all work originally scheduled for delivery in March amounted to only 8,103 man-hours. At that time the company's production force was working at a level of 18,000 man-hours per month. Thus, because of the size of Kranco's workforce, cancellation and postponement of existing orders and deterioration of inbound business, Kranco had in February completed most of the work that had originally been scheduled for March, work scheduled for April would therefore have to be moved up to March and after the April work was completed the company's "cupoard was bare".

In a final dramatic portrayal of the company's reversals, Kranco offered its Manufacturing Cost Summaries for 1973 through 1976, (R. Ex.'s 2, 3). A review of these documents demonstrated that throughout 1973, Kranco's production force worked an average of 1,052 man-hours per day and throughout 1975, 1,031 per day.[3] In no month during 1975 did the company's production average less than 906 man-hours per day; however, despite this past record company's exhibit 2 and 3 showed that between November of 1975 and April of 1976, the average daily hours worked by the company's production force plummeted from 1,196 to 619.[4]

3. This figure is directly related to the amount of work available in the shop.

4. Although not available at the time of trial, the company furnished the Fifth Circuit with the manufacturing cost summary for the entire year of 1976. Such exhibit confirmed that in May of 1976, the average daily man-hours worked fell to an all-time low of 474.

The company further fortified its position through the testimony of some of the alleged discriminatees who testified as NLRB witnesses and who candidly admitted before the reduction of force, work was "slow" (Tr. 398), that about 2 weeks before the termination work suddenly "started slowing down" and "at the time of the terminations there wasn't very much work going on in the shop" (Tr. 282). Such adversity was not peculiar to Kranco's operations for the entire industry was down 30% (Tr. 469). The company's information indicated that such condition was due principally to the general economy in which funds for capital equipment were scarce. More specifically major customers in the utility and energy industries had experienced numerous postponements and reschedulings and a lack of funds in their capital investment programs (Tr. 468-469). The gravity and magnitude of the problems eventually compelled not only the first reduction in force in the company's history but also the preparation and submission of the first revised budget in its history (Tr. 462, 463, 465).

In the final analysis, one irrefutable fact remains in this case—that although the company reduced its work force from approximately 130 to 90, eliminated all overtime and thereby almost cut in half the average daily man-hours worked, the company continued to meet or exceed production requirements. Under the circumstances, *how can it be doubted that the company had economic justification for the terminations it effected?*

In selecting the employees to be terminated, company witnesses further testified without contradiction that they selected employees in the fabrication department because it was the first step in the company's manufacturing pro-

cess and was the department where work shortage was most acute (Tr. 44, 88, 476). Company management further decided that in effecting such reduction in force within that department, initial terminations should come from the night shift, since the company intended to, and did, in fact, eliminate all night shift operations by April, 1976 (Tr. 117, 133), a traditional economic measure in response to adverse business conditions. Finally, as the administrative law judge found the company terminated night shift fabrication department employees on the basis of their seniority, (Tr. 90, 476) and thus all terminated employees in whose behalf the NLRB herein complains had less than a year's service with the company (Tr. 151, 193, 285, 297, 324, 391, 406, 408).

In the face of all of the foregoing the administrative law judge after a feeble and totally erroneous examination of the evidence supporting the company's economic justification completely discredited and labled as "pretextual" the company's explanation. In so holding, the administrative law judge (i) reasoned that all of the company's evidence concerning the company's cancellations and postponements of large crane orders in early 1976 should be discredited because the company offered no documentation in support of its oral testimony concerning same,[5] and (ii) simply dismissed all the rest of its evidence with the bald assertion that "other evidence of its business conditions consisted, in part, of self-serving and vague testimony and documents, some prepared after the fact"

5. In its appeal from the decision of the administrative law judge, Kranco urged the Board to reopen the record pursuant to Board Rule 102.48(b) to permit the company to submit such documentation. (Exceptions and Brief of Kranco, Inc., p. 13) The Board, however, refused.

(ALJD at p. 10). Thus the failure of the company's explanation to withstand scrutiny became further evidence of its guilt. *Publisher's Offset, Inc.*, 225 NLRB No. 149 (1976). Without explanation the NLRB and the Fifth Circuit affirmed the administrative law judge's disposition of the case.

ARGUMENT

Certiorari should be granted because:

(1) the decision of the court of appeals in the instant case adopting and enforcing the board's decision and order, squarely conflicts with a decision of another court of appeals on the same matter and a decision of the Supreme Court on a similar matter.

(2) this case involves basic and important questions of law which conflicting circuit court opinions indicate have become increasingly unsettled;

(3) the issues herein raised have never been passed upon by the Supreme Court.

We shall discuss each of these points separately.

1. *The decision of the court of appeals in the instant case squarely conflicts with a decision of another court of appeals on the same matter and a decision of the Supreme Court on a similar matter.*

The Fifth Circuit's adoption and enforcement of the Board's decision and order in this case produces a holding which is entirely discordant with that of the First Circuit Court of Appeals in *Stone and Webster Engineering Corp. v. NLRB*, 536 F.2d 461 (1st Cir. 1976). In that case, after the Board had proven a prima facie case

of discriminatory terminations, the company presented a substantial amount of basically unrefuted evidence as to the business reasons motivating the company's decision to terminate the employees. Nevertheless the administrative law judge discredited such explanation on the grounds that (i) tne company had failed to present any documentary evidence to substantiate its explanation and (ii) the testimony of the company's witnesses was "unconvincing", "vague, inherently inconsistent and contradictory". The First Circuit reproved such analysis stating that it evidenced a basic misconception concerning the governing burdens of proof.

> "When the evidence of the charging party has raised a reasonable inference of discrimination, that inference may still be rendered unreasonable by the employer's excuse or justification . . . so that more evidence must be produced to establish the alleged discrimination" Id. at 466.

The First Circuit then concluded that the employer having presented a substantial amount of evidence supporting a business justification, the burden then shifted to the Board either to directly challenge the accuracy of the evidence concerning economic necessity or affirmatively show that it was a cloak for actual discriminatory motivation, i.e., that only union adherents were selected for termination. *Id.* at 466

The instant case is factually indistinguishable from *Stone and Webster Engineering*.[6] In each case the employers business justification was discredited in exactly the same fashion. However, as the First Circuit has held

6. Even the basic cause for the down turn in the two company's business is identical.

"it is not enough, as in the case at bar, to ignore or denigrate the business reason, or substitute speculation in its place" *NLRB v.* Fibers International Corp., 439 F.2d 1311 (1st Cir. 1971).

Further, to the extent that the administrative law judge articulated any refutation of the company's economic justification in the present case, he relied primarily, if not exclusively, upon facts which while tending to support a *prima facie* case of discrimination, did not directly disprove the company's economic defense. Analyzing the case in this manner, in essence, affords conclusive and irrebuttable weight to only a *prima facie* showing, a result which is clearly contrary to this Court's recent teachings in *Furnco Construction Corp. v. Waters,* 46 LW 4966, 4970 (1978).

2. *This case involves basic and important questions of law which are presently unsettled.*

In those cases wherein the Board has given begrudging acceptance to an employee's economic justification, it has then been encumbent upon it explicitly to demonstrate that an improper motivation contributed to the discharge. E.g., *Cains Coffee Co. v. NLRB,* 404 F.2d 1172 (10th Cir. 1968). However, in such cases the Board has adopted a lenient test that has permitted it to sustain a violation where it could show that the terminations were motivated "in substantial part" by union animus. E.g., *Coletti's Furniture, Inc. v. NLRB,* 550 F.2d 1292 (1st Cir. 1978). The various circuits have sharply divided on the issue of the "quantum of animus" which must be shown to support a § 8(a)(3) violation. See *Western Exterminator Co. v. NLRB,* 565 F.2d 1114, 1118 n. 3 (9th Cir. 1977). Some circuit court authori-

ties have adopted a more stringent rule requiring that when a discharge appears motivated by both a legitimate business consideration and protected union activity, the test is whether the business reason or the protected union activity is the moving or dominant cause behind the discharge. Id. at 1118. Other courts have restated this stricter test to require the Board to show under such circumstances that the termination would not have occurred "but for" the employee's union activity. *NLRB v. Rich's of Plymouth, Inc.*, 98 LRRM 2685 (1st Cir. 1978).

This Court has firmly rejected the "in substantial part" test and adopted instead the "but for" test in the analogous first amendment area. *Mount Healthy School District Board of Education v. Doyle*, 97 S.Ct. 568 (1977). The Court's holding in that case would appear equally valid in the instant circumstances. However, despite repeated circuit court reversals, the NLRB seems defiantly committed to its less stringent test. See particularly court criticism of the Board in *NLRB v. Rich's of Plymouth, Inc., supra* at 2689, 2690. Clearly it is not the function of the NLRB to second-guess business decisions, and the NLRB's lenient test which just as clearly permits such intrusions should not be perpetuated.

3. *The Supreme Court has never passed upon the issues raised.*

The Supreme Court has never directly addressed the basic and fundamental questions herein at issue, and as the foregoing indicates the circumstances which persuaded this Court to address similar issues in *Furnco Construction Corp.* are equally compelling in the present context.

SUMMARY AND CONCLUSION

It has long been said that "silence is one of the hardest things to refute", and in attempting to sustain the administrative law judge's decision, such argument is the only one that either the NLRB or the Fifth Circuit Court of Appeals has been able to make in response to the contentions of the instant petitioner. The resulting disposition, however, leaves (i) undetermined the burden of proof that an employer must initially satisfy to sustain an economic defense, (ii) unchecked the NLRB's propensity to label an employer's economic justification pretextual to avoid the necessity of presenting anything more than a *prima facie* case to sustain an 8(a)(3) violation and (iii) unresolved the conflict concerning the "in substantial part" test which the Board applies to further discredit an employer's economic defenses and correspondingly to lessen any further burden of proof that it must satisfy. Had the correct "but for" test been applied in the instant case, one would not conclude that the Board had sustained its burden. Accordingly writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit in order that these basic issues may be finally resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served upon Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, and Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same to them postage prepaid, at their respective addresses this _____ day of July, 1978.

CLINTON S. MORSE

APPENDIX 1

JD-646-76
Houston, TX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 23-CA-5975

KRANCO, INC.,
Respondent
and
CARPENTERS DISTRICT COUNCIL OF HOUSTON & VICINITY, affiliated with UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA,
Charging Party

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of Houston, TX, for the
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James V. Carroll, III, Esq., and
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Cliff G. Shawd, of San Antonio, TX,
for the Respondent.

Michael L. Atkinson, Esq., of
Houston, TX, for the Charging Party.

DECISION

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: This matter was heard in Houston, Texas on May 12,

13 and 14, 1976. The complaint issued on March 31, 1976, pursuant to a charge filed on March 4, 1976, was amended at hearing and alleged violations of Sections 8(a)(1) and (3) of the Act. Respondent's timely filed answer was also amended at hearing. All parties have filed briefs.[1]

Upon the entire record herein, including my observation of the witnesses as they testified, I hereby make the following:

Findings of Fact and Conclusions

I. The Employer's Business and the Union's Labor Organization Status

Kranco, Inc., herein called Respondent, is a Texas corporation engaged in Houston, Texas, in the manufacture and sale of overhead cranes. Jurisdiction is not in issue. The complaint alleges, the answer admits and I find and conclude that Respondent is an employer engaged in commerce within the meaning of section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits and I find and conclude that Carpenters District Council of Houston & Vicinity, affiliated with United Brotherhood of Carpenters & Joiners of America, herein called the Union, is a labor organization within the purview of Section 2(5) of the Act.

1. Respondent filed a reply brief, to which General Counsel objected and moved to strike, correctly asserting that the Board's Rules and Regulations do not provide for reply briefs to the Administrative Law Judge. *J. E. Cote,* 101 NLRB 1486, fn. 4 (1952). Thereafter, General Counsel filed a Motion requesting that I take notice of a recent Board decision and urging that it be deemed dispositive of the issues herein. General Counsel's motion is, itself, in the nature of a reply brief and I deem its filing a waiver of General Counsel's objections to my receipt of Respondent's reply brief. Additionally, I note that both post-brief submissions facilitated and did not delay my resolution of the issues herein. Accordingly, I deny General Counsel's motion to strike, and have considered both documents. See *Cavender Oldsmobile Company,* 181 NLRB 148, TXD fn. 2 (1970).

II. The Alleged Unfair Labor Practices

A. *Union Activity*

Overt union activity among Respondent's employees began on February 19, 1976 (all dates hereinafter are 1976 unless otherwise specified) with a distribution of literature and authorization cards in front of the plant. The activity immediately came to the attention of Raymond Vajdak, plant superintendent, and John Pearson, personnel manager. Pearson telephonically reported it to Thomas J. Lee, Respondent's Executive Vice President, who was out of town at the time.[2] A distribution on February 24 announced meetings to be held on February 26, with the day and night shift employees. The night shift met with union representatives at a restaurant following the end of their shift. Authorization cards were distributed and approximately 16 of the 30 night shift employees signed and returned cards at that time. Several more were returned by W. C. Bowen, the Union's in-plant organizer. An additional meeting was held with the night shift employees on March 1. A representation petition, bearing the date of March 4, was filed by the Union (Case No. 23-RC-4359).

2. The supervisory status of Lee, Vajdak and Pearson is admitted.

B. *The Employer's Response—Alleged Section 8(a)(1) Violations*

Kranco's official response was a letter from its president to the employees, distributed on March 2. The

letter urged employees not to select union representation and based its arguments upon the costs of union dues, fines and assessments, the risk and financial burdens of strikes, the Union's lack of interest in them or investment in the plant, the Union's alleged misuse of money, and the disadvantages of a seniority system, grievance procedure and check off. Specifically, the letter stated, *inter alia*:

> These strangers are not out getting customers to buy our cranes so you will have work. They are not putting up their money to make this a safe comfortable place to work. They are not doing anything for you except causing you to risk everything so they can collect tribute from you.
>
> * * *
>
> The threats to your welfare come from the Union —not the company.
>
> * * *
>
> You would not like a union contract hanging over you.
>
> You would not like "job classifications" which pegs you and freezes your pay.
>
> You would not like "seniority" which limits your progress.

Various employees testified in regard to conversations with night supervisor Tommy Michulka (supervisory status admitted) both before and after the March 2 letter issued. Michulka did not testify. General Counsel contended that these conversations violated Section 8(a)(1). Thus, W. L. Gilmer testified that on the evening of February 27, Michulka came up to him and asked what he thought about the Union. Gilmer gave a noncommittal answer. Steven Norton testified that while he was reading

Respondent's March 2 letter, Michulka asked him, "Are you for the Union?" and what he thought of it. They had a brief discussion of their opposing points of view. Michulka also asked Scott Forbes whether he had a union card and if he knew who was passing them out. In yet another conversation, after Forbes had asked Michulka whether Michulka knew that W. C. Bowen was the Union spokesman on the night shift, Michulka asked him who the spokesman was for the day shift. I credit the foregoing testimony and find that the foregoing conversations constitute inherently coercive interrogations in violation of Section 8(a)(1) of the Act. *Crown Zellerbach Corporation*, 225 NLRB No. 130 (1976); *P.B. and S. Chemical Corporation*, 224 NLRB No. 1 (1976). That Michulka may have enjoyed a rapport with his employees, may have been well thought of by them and even may have been considered a friend by some, does not negate the coercive nature of questions seeking to elicit the union sympathies of a particular employee and others. As the Board noted in *Quemetco, Inc.*, 223 NLRB No. 53, sl. op. 3 (1976):

> An employee is entitled to keep from his employer his views concerning unions, so that the employee may exercise a full and free choice on the point, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction that his views may stimulate in the employer. That the interrogation may be suave, courteous, and low-keyed instead of boisterous, rude, and profane does not alter the case. It is the effort to ascertain the individual employee's sympathies by the employer, who wields economic power over that individual, which necessarily interferes with or inhibits the expression by the individual of the free choice guaranteed him by the Act.

Employees Bowen, Gilmer, Melvin and Mason relate hearing statements by Michulka to the effect that they should not get "messed up" with the Union because it was "no good," that they did not want the Union, and that it would only cause trouble, the latter two statements phrased crudely and profanely. Such statements, I find, do not contravene the Act's provisions; they are mere statements of permissible opinion.

On March 2, Bowen approached Michulka and asked him, "What position would it put me in with the company toward being fired or dismissed if I was to say that I was an organizer and promoter for the Union on the night shift?" Michulka asked him what he was talking about and Bowen stated that he was the promoter of the Union on the night shift. Michulka first told Bowen that he could not answer him, but, when pressed, said that it would not affect his employment. Later that evening, according to Bowen, Michulka asked Bowen if he was the Union's organizer on the night shift and Bowen hesitantly answered that he was. In light of Bowen's earlier volunteered admission of his role, I cannot find Michulka's subsequent question to constitute coercive interrogation.

About March 1, Mason heard a conversation between Robert Chapman, day electrical foreman (supervisory status admitted) and Walter Schultz, in which Chapman asked Schultz, "Just between me and you . . . how do you feel about this Union? It won't go any further."[3] I credit Mason's uncontradicted testimony and conclude, for the reasons set forth *supra*, that Chapman's questioning of Schultz constituted coercive interrogation in violation of Section 8(a)(1).

3. Mason was Schultz' helper and worked in close proximity to him. Chapman did not testify.

During the week of February 25 to March 1, employee James Armstrong participated in a conversation with two other employees who were talking about pay raises they had received. David Rattray, who was contended by General Counsel to be the night electrical foreman and a statutory supervisor, joined the conversation. He told the employees that when a union had previously tried to come in, the employer had made promises to the employees and was giving these raises now so that the employees would not vote for the Union. Rattray did not testify.

Respondent denied that Rattray was a supervisor and contended that he was only the lead electrician on the night shift. The record reflects that Rattray was on the night shift for about 3½ months. He was hourly paid, at the rate for a lead electrician on that shift. Admitted supervisors were salaried. Rattray worked with two other employees in the electrical department, a trainee and a helper; he was also observed, from time-to-time, telling the trainee and the helper what to do, checking their work, reassigning them from job to job, working with them and sitting in the office reading or taking coffee while the others worked. In all, there were about 30 people on the night shift during February. Michulka was the only admitted supervisor working on that shift. According to plant superintendent Vajdak, Rattray received his instructions for the night's work on a work schedule from the electrical foreman on the day shift and would follow that schedule in performing or assigning work. Rattray did not appraise the work of the others in the electrical department on the night shift or

make recommendations regarding wage increases. That was done by the day foreman by examination of the work performed and the work sheets completed. On one occasion, Rattray was involved in the discharge of an employee: Michulka had reported to Vajdak that he had complaints from Rattray that a given employee would not respond to work instructions and would wander away from his work area. Vajdak gave instructions to the day foreman that if the conduct was repeated, that employee was to be terminated. When Rattray again reported an infraction by this employee, he was terminated. The termination was effected by Rattray.

Based upon the foregoing, I conclude that David Rattray did not possess or exercise the statutory authority indicative of supervisory status. He was but a conduit of management's instructions to himself and other employees within the small department in which he worked. In so concluding, I note that there was a supervisor on duty at all times and that if Rattray were to be found a supervisor the electrical department would have been the only department so directly supervised on the night shift. Accordingly, I shall recommend dismissal of the alleged Section 8(a)(1) violation attributed to Rattray.

Clifford Melvin began working for Respondent about October 10, 1975, as a fitter helper, at $3.30 per hour plus 20 cents night shift differential. After 3 months of employment he questioned Michulka about a raise he believed due him. Michulka subsequently told him that under a new company policy, raises were not due for 6 months. About February 1, a fitter quit and Melvin was promoted into his place. He spoke to Michulka about his raise and was told that he would be put in for a raise, to about $3.80 per hour. He learned that he was receiving

a 70 cents raise on the Monday following the first Union meeting. He received the raise in the pay he received on March 3, the night he and others were terminated. It was one of the largest raises given by Respondent. It placed Melvin into the second step of the trainee classification. General Counsel contended that Melvin's raise was given to dissuade support for the Union, and thus violated Section 8(a)(1). Melvin had received a bona fide promotion, prior to the Union activity and his raise was consistent with that promotion. The evidence is insufficient to warrant a finding that the raise was intended to interfere with the exercise of free choice by either Melvin or any other employee.

On March 4, the day following the termination of 10 night shift employees (discussed *infra*), Lee called meetings for the day and night shifts. In his speech to each group he spoke about both the terminations and the Union campaign, and he admitted that the latter was what occasioned the meetings. He described how orders had slacked off or been cancelled. He described the Company's recent acquisition of Euclid Crane Company in Cleveland, Ohio. James Hindman, who attended the the day shift meeting, and C. L. Cullever, who attended the night shift meeting, both attributed to Lee a statement to the effect that Respondent could transfer work from Euclid to Kranco if Kranco's work became slack but that he would not do so if the Union came in. Lee denied making this statement and claimed that he told the employees that they did not want the Union to come in and that some of their customers might object to buying a crane from a shop that was unionized, because of the potential for work stoppages. Cullever recalled Lee making the latter statement; Hindman did not. Pearson confirmed Lee's

version of the speeches. Based upon the foregoing testimony and my observation of the comparative demeanors of the witnesses I credit the testimony of the employee witnesses, Hindman and Cullever.[4] Accordingly, I find that in his speeches of March 4, Lee threatened employees with diminished work oportunities in the event that they selected the Union to represent them in violation of Section 8(a)(1). I note also, in reaching this conclusion, that even crediting Lee's version, Lee's statement that customers might not want to do business with them if unionized, constituted an impermissible threat of loss of employment opportunities. This was an employer prediction of adverse consequences stemming from unionization unsupported by the requisite objective factual basis. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618-120 (1969); *Hertzka and Knowles*, 206 NLRB 191, 194-195 (1973).

C. *The Alleged Discrimination*

In the early morning hours of Thursday, March 4, at the conclusion of the night shift which had begun on March 3, Respondent discharged 10 employees from its structural department: J. L. Armstrong, Danny Starnes, Steven Norton, Dan Mason, Scott Forbes, Kenneth Carriere, Clifford Melvin, W. L. Gilmer, Steve Hundl and William C. Bowen. They were informed, by a letter read to them at that time, that "reversals in the business situation, as it has affected several of our customers, has resulted in cancellations of orders and postponements in

4. Cullever was still employed by Respondent at the time he gave this testimony. That he would so testify, and incur the potential enmity of his employer, is an additional factor I have considered in deeming him credible. *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961).

other cases, thus causing a shortage in our workload. This in turn has caused us to discontinue our night fabrication work." All of these employees had attended union meetings and/or signed union authorization cards. On March 12, James Hindman, a day shift welder, was also terminated, supposedly for the same reasons. Hindman had signed a union authorization card on February 25 and had attended a union meeting on March 9. At that meeting he was appointed as a witness to accompany the newly appointed in-plant committee to see Superintendent Vajdak when they went to inform him that they would be soliciting membership in the plant. The committee, and Hindman, so informed Vajdak on March 10. Those terminations were the first in Kranco's history for such alleged reasons. Indeed, new employees were regularly told that they did not have to worry about layoffs.

Respondent asserts that the discharges were unrelated to the Union activity and were solely motivated by adverse business conditions. The record reflects the following:

1975 was a record year for Kranco. Gross revenues exceeded $9 million and after tax earnings were approximately $750,000. On December 12, 1975, Respondent's employees were sent a letter of season's greetings, informing them of the record established and stating that they were going into 1976 "with the largest backlog [of orders] in the history of our company." As of October 1975, Respondent had prepared a budget for 1976 anticipating another record year, increasing after tax earnings by approximately $80,000. However, according to Respondent's witnesses, business began to slack off in December 1975. An order for one crane was cancelled and

two orders that had been scheduled for 1976 delivery were postponed until 1977. These cranes had a total value of approximately $1,200,000 and allegedly represented 25,000 to 30,000 shop hours.[5] The pace of new incoming orders also slackened, according to this testimony, and even with increased sales effort, including an alleged reduction in profit margin, sales did not keep pace with cranes being shipped. Respondent introduced summaries reflecting its backlog of orders (in dollars) and the estimated number of shop hours required to complete those orders, as of March 1, 1975, February 7, 1976 and February 28, 1976. Those summaries show as follows:

	3/1/75 dollars/est. hours	2/7/76 dollars/est. hours	2/28/76 dollars/est. hours
March	— 616,623/18,388	840,903/25,710	905,976/20,725
April	— 897,160/28,834	465,945/13,375	629,048/21,631
May	— 524,343/13,093	192,360/ 4,440	203,560/ 4,605
June	— 760,420/23,465	490,275/10,690	490,383/10,721
July	— 365,940/ 8,746	607,529/12,955	627,427/12,946
August	— 804,241/19,175	34,700/ 793	69,930/ 1,068
Sept.	— 683,082/18,378	48,250/ 725	48,250/ 725
Oct.	— 284,204/ 7,734	276,815/ 6,110	267,930/ 6,005
Nov.	— 455,102/13,000	1,434,392/18,615	1,434,392/18,615
Dec.	— 572,295/17,330	55,018/ 855	52,722/ 855

These summaries do not, of course, reflect orders which might be received (or lost) after their respective dates. Respondent also introduced summaries showing that in 1973, the plant had worked an average of 1,052 man hours per day. The average was 1,045 hours per day in 1974 and 1,031 in 1975. The plant worked an average of 1,026 hours per day in January 1976, 914 in February

5. No documentary evidence identifying or describing these orders was adduced during the hearing.

and 723 and 619 respectively in March and April, after the terminations. In 1975, during the months of February, March, April, and May, the average daily hours worked had been 932, 906, 956, and 915 respectively. Vajdak testified that they were able to meet or exceed production requirements with the reduced manpower.

Overtime was a regular feature of employment with Respondent and there were 10-hour days and Saturday work throughout 1975 and until the end of January 1976. The plant continued to work 9 hours per day, on both shifts until the end of March, when the plant finally went on an 8-hour day. Lee and Vajdak testified that they did not reduce overtime earlier, in lieu of the terminations, because they feared an adverse impact on morale.

According to Lee and Vajdak, a decision to reduce the workforce was made in the last week in February, about a week before the discharges actually took place.[6] Vajdak testified that his instructions from Lee were to reduce the force by 30 to 35 percent. The details of how and who were supposedly left to Vajdak and Pearson.[7] Lee made decision to effectuate the reduction on the morning of March 3. The record reflects no evidence of any specific precipitating event on or about that date. Vajdak chose to eliminate 10 employees from the structural department on the night shift, on the basis that approximately 50 percent of production work is performed in the structural department and that is the department where production

6. Pearson allegedly took part in this decision. However, his testimony as to when the decision was made was vague, shifting and conjectural.

7. Neither Lee nor Pearson testified as to any communication, at that time, to effect a reduction by a specific percentage of the workforce.

on new cranes begins. The terminations followed seniority among those in that department on that shift. No employees were transferred to the day shift or offered the opportunity to go into other departments.[8] In all, there was a reduction of the workforce by about 40 employees by the end of April; about one-half during March and the remainder in April. Approximately half of the reduction occurred through natural attrition. The night shift was shut down at the end of April and employees on that shift who were not terminated were transferred to days.

General counsel contends that the evidence establishes that the discharges were motivated by the employees' union activities, rather than the business conditions, and were thus violative of Section 8(a)(3). Upon the evidence in its entirety I am constrained to agree with General Counsel.

All of the elements for finding the discharges to have been substantially motivated by the union activities are present herein. See *Publishers' Offset, Inc.*, 225 NLRB No. 149 (1976). Respondent had knowledge that its employees were engaging in union activity and, from the conversations occurring on the night shift between Michulka and the employees, had reason to conclude that the activity was strong, if not centered, among the night shift employees in the structural department. All of the discharged employees were, in fact, card signers. Respondent also demonstrated union animus by its March 2 letter,[9]

8. Respondent's production is a continuous process; the night shift does not work on separate projects. Rather, it continues from where the day shift leaves off.

9. The complaint did not allege the letter to be independently violative of Section 8(a)(1). However, I deem its statement that the Union was causing employees to "risk everything," a thinly veiled threat evidencing animus.

the interrogations by Michulka and Chapman, and by Lee's March 4 speeches which contained threats of job loss in the event of successful union organization. Such "antiunion bias and demonstrated unlawful hostility are proper and significant factors for Board evaluation in determining motive." *N.L.R.B. v. Dan River Mills*, 274 F.2d 381 (C.A. 5, 1960); *Publishers' Offset, Inc., supra.*

The timing of the discharges in the instant case, and their precipitous nature, further evidence the unlawful motive. Even crediting Respondent's witnesses in regard to the decision to reduce the workforce, that decision was made almost immediately upon the inception of the union activity and Respondent's acquisition of knowledge thereof. The discharges took place in that same time span and on the day between Respondent's antiunion letter and Lee's antiunion speeches. They also occurred in mid-week, with no advance warning to the employees, and in the absence of any event which might have occasioned such precipitous action.

Finally, for a number of reasons, I find Respondent's economic defense unpersuasive. Central to its contention was the alleged loss of one order and the postponement of two others. Details of these transactions, including the size, scope and timing, and documentary evidence thereof (which must necessarily have existed in contracts of such magnitude) were not offered. Other evidence of its business conditions consisted, in part, of self serving and vague testimony and documents some prepared after the fact. More significant, however, are the inconsistencies in Respondent's actions. In December, it boasted of a record year with another to follow. Even allowing for some reduction in business, the evidence did not establish

that sales would be significantly below of 1973, 1974, and 1975, when the plant operated, without reductions-in-force, at an average of over 1,000 man hours per day. Moreover, Respondent's exhibits establish that as of both February 7 and February 28, 1976, the backlog the orders for March was higher than it had been for the same month 1 year earlier. Further, these same exhibits reveal that between February 7 and February 28, the backlog of orders for April delivery increased by more than a third, over $160,000 and increased the necessary shop hours by approximately 8,000. I further note, in this regard, that, as Respondent admitted, the early months of each year was its usual slow period.

Additionally, Respondent had met slow periods before without layoffs and, indeed, this and the regularity of overtime were selling points in the hiring of new employees. Respondent continued its overtime, 2 hours per day per employee plus Saturday work through January, and 1 hour per day even after the discharges in question, even though it claimed to be looking for solutions to the slackening off of business as early as December 1975. With approximately 130 employees, 2 hours of daily overtime equals 390 paid man hours per day; eliminating even the 1 hour of daily overtime worked after February saves 195 paid man hours per day without any terminations. I find unpersuasive Respondent's argument that reduction in overtime threatened to create a morale problem. It seems clear that discharges, after a history that did not even include layoffs, would be at least equally threatening to morale. Further, faced with an alleged economic situation warranting a reduction in profit margins, it is unlikely that Respondent would have rejected the savings potential of premium pay. I note, too, that

while there was no evidence of any permanent change in the pattern of Respondent's business, Respondent did not lay off the employees in question, they discharged them.

Casting further doubt on Respondent's claimed motivation and indicating the precipitous and inconsistent nature of the discharges are various personnel actions by Respondent. Notwithstanding the alleged decline in business, James Hindman was hired on February 16, as a welder. Several of the employees terminated on March 4 were welders, with greater seniority than Hindman. As previously noted, Clifford Melvin received a substantial wage increase effective in the week before his discharge. He actually saw this increase, for the first time, in the pay he received after discharge. Additionally, Respondent continued to advertise for employees all during the period of its alleged crisis. A trailer, advertising job openings, remained outside the Kranco premises until the end of March. Respondent's explanation, that it was paid for on a monthly basis and was retained through March because it was paid for, is implausible and, even if believed, does not explain why it would have been rented for the months of January, February and March in the face of the alleged loss of business. Moreover, Respondent ran newspaper advertisements for crane service personnel and crane service trainees (bargaining unit positions) after the March 4 discharges, gave no consideration to any of the discharged employees for such positions and when one of the discharged employees applied for such a job, informed him that the minimum qualifications for the job had just been increased. Considering all of the above, I conclude that "Respondent's unconvincing reasons for the [discharges] actually support the General Counsel's

prima facie case of unlawful discrimination." *Paramount Metal & Finishing Co.*, 225 NLRB No. 61 (1976).

Finally, while I do not give it great weight, I note that when Gilmer confronted Michulka with the statement that they both knew that the employees were being terminated because of the Union, Michulka did not deny it. Instead, he nodded his head in the manner normally recognized as signifying agreement.[10]

Accordingly, I find that by discharging the 10 previously named employees from the night shift on March 4, and by discharging James Hindman on March 12, Respondent has discriminated against those employees because of their union activity, and has thereby violated Section 8(a)(3) of the Act.

III. *Further Conclusions of Law*

1. By threatening employees with loss of employment opportunities or other reprisals, and by interrogating employees concerning their union activity, membership and support, Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed them under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

2. By discharging the employees named below in order to discourage union activity, membership and support, Respondent has discriminated in regard to the hire and tenure of their employment, in violation of Section 8 (a)(3) and (1) of the Act:

10. I do not deem Michulka's implied admission sufficient to constitute an independent violation of Section 8(a)(1) as alleged in the complaint.

J. L. Armstrong	Clifford Melvin
Danny Starnes	W. L. Gilmer
Steven Norton	Steve Hundl
Dan Mason	William C. Bowen
Scott Forbes	James Hindman
Kenneth Carriere	

3. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not engaged in any unfair labor practices not specifically found herein.

IV. *The Remedy*

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged the employees named in paragraph III (2) above, Respondent shall offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and shall make them whole for any loss they may have suffered by reason of the discrimination against them. Any backpay found to be due shall be computed in accordance with the formula in *F. W. Woolworth Company*, 90 NLRB 289 (1960), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

"A violation of Section 8(a)(3) goes to the very heart of the Act." It therefore warrants that Respondent be

further required to cease and desist from infringing in *any other manner* upon the rights guaranteed employees by Section 7 of the Act. *Pan American Exterminating Co.*, 206 NLRB 298, fn. 1 (1973); *Entwistle Manufacturing Company*, 23 NLRB 1058, enforced as modified, 120 F. 2d 532 (C.A. 4, 1941).

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

The Respondent, Kranco, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Threatening employees with loss of employment opportunities or other reprisals in order to discourage union activity, membership and support.

(b) Interrogating employees concerning their union activity, membership and support.

(c) Discouraging membership in or activities on behalf of any labor organization, by discharging or otherwise discriminating against employees in any manner with regard to their rates of pay, wages, hours of employment, hire, tenure of employment or any term or condition of their employment.

11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer the following named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy:"

J. L. Armstrong	Clifford Melvin
Danny Starnes	W. L. Gilmer
Steven Norton	Steve Hundl
Dan Mason	William C. Bowen
Scott Forbes	James Hindman
Kenneth Carriere	

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(c) Post at its Houston, Texas facility copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

12. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

Dated at Washington, D.C.

/s/ MICHAEL O. MILLER
Michael O. Miller
Administrative Law Judge

APPENDIX

JD-646-76

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization;

To form, join or help a union;

To bargain collectively through a representative of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all these things.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights. More specifically:

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union activities.

WE WILL NOT interrogate our employees concerning their union membership, activity or support.

WE WILL NOT threaten employees with loss of employment or other reprisals if they engage in union activity or select a union as their collective bargaining representative.

WE WILL NOT, in any other manner interfere with, restrain or coerce our employees in the exercise of their rights as set forth above.

WE WILL reinstate the following named employees to their former jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings with backpay plus 6 percent interest.

J. L. Armstrong
Danny Starnes
Steven Norton
Dan Mason
Scott Forbes
Kenneth Carriere
Clifford Melvin
W. L. Gilmer
Steve Hundl
William C. Bowen
James Hindman

KRANCO, INC.
(Employer)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions

may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Houston, Texas 77002, Suite 920, (Tel. No. 713-226-4722).

APPENDIX 2

MFP

228 NLRB No. 45

D—2171
Houston, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 23-CA-5975

KRANCO, INC.

and

CARPENTERS DISTRICT COUNCIL OF HOUSTON & VICINITY, AFFILIATED WITH UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA

DECISION AND ORDER

On October 8, 1976, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, both the General Counsel and Respondent filed exceptions and supporting briefs and Respondent filed a brief in opposition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Kranco, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Insert the following as paragraph 1(c) and reletter the following paragraphs accordingly:

"(c) Threatening employees by indicating that employees have been terminated because of their support for the Union."

2. Substitute the attached notice for that of the Administrative Law Judge.

---

1. The Administrative Law Judge found that, at the time of Respondent's March 4 discharge of its night-shift employees, employee Gilmer confronted Supervisor Michulka with the statement that they both knew that employees were being terminated because of the Union. Michulka nodded his head in the manner normally signifying agreement. Unlike the Administrative Law Judge, we find that this acknowledgement that employees were discharged because of their support for the Union violated Sec. 8(a)(1) of the Act. Certainly, if a threat to discharge violates Sec. 8(a)(1), *a fortiori*, an acknowledgement (or statement) that union activities precipitated the discharge would constitute a violation of that section of the Act. Indeed, to employees who were not discharged, it was tantamount to a threat of similar treatment for them if they chose to engage, or continued to engage, in union activities.

Dated, Washington, D.C. February 18, 1977.

Betty Southard Murphy, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

D—2171

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help a union
To bargain collectively through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all these things.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights. More specifically:

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union activities.

WE WILL NOT interrogate our employees concerning their union membership, activity, or support.

WE WILL NOT threaten employees with loss of employment or other reprisals if they engage in union activity or select a union as their collective-bargaining representative.

WE WILL NOT indicate to our employees that employees have been terminated because of their support for the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights as set forth above.

WE WILL reinstate the following named employees to their former jobs or, if such jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings with backpay plus 6-percent interest.

J. L. Armstrong	Clifford Melvin
Danny Starnes	W. L. Gilmer
Steven Norton	Steve Hundl
Dan Mason	William C. Bowen
Scott Forbes	James Hindman
Kenneth Carriere	

KRANCO, INC.
(Employer)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions

concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002, Telephone 713-226-4722.

APPENDIX 3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1693

KRANCO, INC.,
Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

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(April 11, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

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1. See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX 4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1693

KRANCO, INC.,
Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

(TEXAS CASE)

ON PETITION FOR REHEARING

(May 10, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ HOMER THORNBERRY
United States Circuit Judge

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1693

KRANCO, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: THORNBERRY, RONEY and HILL, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Kranco, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on February 18, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on March 15, 1978, and has considered the briefs and transcript of record filed in this cause. On April 11, 1978, the Court, being fully advised in the premises, issued its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced,

and that Kranco, Inc., Houston, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Costs are taxed against petitioner cross-respondent.

ENTERED: May 18, 1978

ISSUED AS MANDATE: